

D.P.U. 96-45

Petition of the Massachusetts Municipal Wholesale Electric Company for Authority Under G.L. c. 164, § 72A to Enter Upon Lands to Survey

APPEARANCES: Nicholas J. Scobbo, Jr., Esq.
Ann Ryan-Small, Esq.
Ferriter, Scobbo, Sikora, Singal, Caruso & Rodophele, P.C.
One Beacon Street
Boston, Massachusetts 02108
FOR: MASSACHUSETTS MUNICIPAL WHOLESALE
ELECTRIC COMPANY
Petitioner

I. INTRODUCTION

On April 24, 1996, Massachusetts Municipal Wholesale Electric Company ("MMWEC" or "Company") filed a petition with the Department of Public Utilities ("Department") seeking authority under G.L. c. 164, § 72A to enter upon land in the towns of Ludlow, Wilbraham, Hampden, Monson and Palmer for the purpose of making a survey of proposed natural gas pipeline routes, preliminary to eminent domain proceedings.

MMWEC is proposing to construct a 15-mile, 16-inch natural gas pipeline from its Stony Brook Energy Center power plant in Ludlow to a point of connection with the Tennessee Gas Pipeline Company interstate pipeline in southern Massachusetts (Petition at 2). MMWEC states that the purpose of the pipeline "is to provide quantities of natural gas sufficient to enable the [Stony Brook power plant] to operate more frequently (if not entirely) on natural gas, resulting in both economic benefits associated with lower fuel costs and a reduction in emissions from the plant" (id.).

MMWEC has identified a primary and an alternative corridor (or route) for the proposed pipeline (Petition, Exh. A). The primary corridor runs through the towns of Ludlow, Wilbraham and Hampden; the alternative corridor runs through the towns of Palmer, Ludlow, Wilbraham and Monson (id.). The Company states that "[t]o determine the placement of the final [forty-foot

wide pipeline] right-of-way within the 3000 feet wide corridors [sic], and to determine the lands which may be subject to MMWEC's power of eminent domain,¹ it is necessary to enter temporarily upon the private lands comprising the corridors to conduct surveys and other field studies" (Petition at 4). According to the Company, most landowners have provided permission (MMWEC's May 22, 1996 Letter to Hearing Officer at 1). The Company seeks Department authority to enter the property of 14 landowners along the primary corridor who have refused permission (see Company's June 24, 1996 Letter to Hearing Officer). Those 14 landowners are listed in Appendix A to this Order.²

¹ MMWEC contends that c. 775, § 7 of the Acts of 1975 give the Company eminent domain powers and that, therefore, it is not necessary for MMWEC to petition the Department for authority to take land by eminent domain for construction of the pipeline (MMWEC's June 17, 1996 Letter to Hearing Officer at 2). See Section II, below for further discussion.

² In its Petition, the Company originally had asked for "blanket" approval to enter and survey any lands along the primary and alternative corridors for which it could not obtain permission from the landowners (Petition at 5, Exh. B). In discussions with the Hearing Officer, MMWEC narrowed its request to seek access only to the land of those 14 landowners listed on Appendix A (see Hearing Officer's June 7, 1996 Letter to MMWEC at 2; MMWEC's June 17, 1996 Letter to Hearing Officer). However, MMWEC also asked that the Department keep the docket open in the event that MMWEC determined the need to survey other lands along the primary corridor and permission could not be obtained from the landowners (MMWEC's June 17, 1996 Letter to Hearing Officer at 2). The Company stated that such additional surveys may be necessary "[i]f environmental or other problems are discovered during the survey process ... [and] it may be necessary to shift the contemplated right-of-way within the 3,000 foot corridor" (id.) (emphasis in original). On July 11, 1996, MMWEC filed with the Department a request for authorization to enter upon and survey the property of 13 additional landowners who had denied the Company survey permission. That request will be addressed by a subsequent Department order.

General Laws c. 164, § 72A authorizes the Department to grant an electric company authority to enter private lands for the purpose of making a survey preliminary to eminent domain proceedings.³ The Department may grant such permission without notice and hearing. Carlisle v. Department of Public Utilities, 353 Mass. 722 (1968). In acting on this petition, the Department exercised its discretion on the question of notice and hearing by mailing notice of this proceeding to all landowners upon whose land the Company has petitioned for authority to enter (see Appendix A). This notice, dated June 28, 1996, provided that property owners could submit comments on the petition to the Department by July 10, 1996. The Department received comments from the following landowners: John P. Greeley; Dorothy Pepin; Stephen J. Rourke; Raymond F. Fusaro; Arthur and Merle Messer; and Robert, Rita and Viola Nordin.

On July 10, 1996, the Berkshire Gas Company ("Berkshire") filed a petition to intervene along with comments challenging MMWEC's claim of entitlement to eminent domain authority in this proceeding and urging the Department to investigate the issue (Berkshire Comments and Petition for Intervention at 1-2). Berkshire seems to argue that MMWEC does not have eminent domain authority to construct a high-pressure natural gas pipeline and, therefore, that the Company's § 72A petition is invalid (id.). Berkshire contends that it will be substantially and specifically affected by resolution of this "policy matter[] of significant precedential value" (id. at 2).

³ MMWEC is an electric company to which the statute applies. See St. 1975, c. 775, § 19.

II. ANALYSIS AND FINDINGS

As an initial matter, the Department addresses Berkshire's petition to intervene. This proceeding is not an adjudication, as defined in G.L. c. 30A, § 1(1). See Carlisle, supra at 722, 724. Thus, intervention is not contemplated, and the Department denies Berkshire's petition to intervene. G.L. c. 30A, § 1(3).

Dismissal of its petition to intervene leaves Berkshire without standing to raise arguments about the substance of MMWEC's petition. Nevertheless, the Department will address Berkshire's substantive claims. While the Department is not necessarily persuaded that MMWEC's eminent domain powers under St. 1975, c. 775, § 7 extend to the construction of a high-pressure natural gas pipeline, disposition of this issue is not vital for purposes of ruling on the instant petition. Even if MMWEC lacks such authority under St. 1975, c. 775, § 7, it could still take property by eminent domain under G.L. c. 164, § 75C by petitioning to be declared a "natural gas pipeline company," pursuant to G.L. c. 164, § 75B. The survey currently being conducted by MMWEC is a necessary preliminary step either to an eminent domain proceeding under St. 1975, c. 775, § 7, or under G.L. c. 164, § 75C.⁴

Before the Department makes a determination on the Company's petition filed under G.L. c. 164, § 72A, the Department considers the comments submitted by the affected landowners. The comments reflected landowners' opposition to the proposed route, including the need for the pipeline, and concerns about perceived negative impacts of the proposed pipeline project, but did

⁴ G.L. c. 164, § 75D makes the provisions of c. 164, § 72A applicable to natural gas pipeline companies.

not address issues specific to the Company's survey petition. The Department finds the Company's petition to be appropriate as a necessary preliminary activity incident to the proposed pipeline project. In prior survey cases, the Department has found it necessary and reasonable to attach certain conditions to a § 72A grant of authority, intended to limit the intrusion of the survey process on landowners' property. See, e.g., Tennessee Gas Pipeline Company, D.P.U. 93-131 (1993). Accordingly, the Company is granted authority to enter those lands listed in Appendix A, subject to the conditions enumerated in Section III of this Order.

The Department's approval under § 72A does not constitute a judgment regarding the project itself or the need for or location of eminent domain takings. Consideration of, and findings regarding, the underlying project are reserved for the Company's later petitions to the Department and the Energy Facilities Siting Board. The Department will keep this docket open for a reasonable period of time to allow MMWEC, for the reasons noted above, to supplement its petition should MMWEC identify additional land for which it is unable to obtain permission to survey.

III. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That, for the purpose of making surveys and field studies in connection with the proposed Stony Brook/Tennessee Pipeline Project, as described in the Company's petition and attachments, Massachusetts Municipal Wholesale Electric Company, acting through its employees, agents, and representatives, is authorized to enter upon the lands of those persons listed in the attached Appendix A; and it is

FURTHER ORDERED: That the Massachusetts Municipal Wholesale Electric Company comply with the following conditions: (1) no trees or timber shall be cut down or removed on the affected properties; (2) small brush may be cut down and removed on the affected properties, but only in areas where surveyors need to make a line of sight; (3) areas excavated for purposes of conducting archaeological surveys on the affected properties must be restored to a condition reasonably consistent with their condition before construction; (4) no blasting shall be conducted on any of the affected properties; and (5) the Massachusetts Municipal Wholesale Electric Company shall provide a copy of its petition and plans to any of the landowners listed in Appendix A that request a copy; and it is

FURTHER ORDERED: That the Massachusetts Municipal Wholesale Electric Company shall transmit a copy of this Order, by certified mail, to the landowners listed in the attached Appendix A at least five days prior to any entry upon the affected properties; and shall certify to the Department no later than 14 calendar days following transmittal of this Order to all the landowners that such transmission has been accomplished; and it is

FURTHER ORDERED: That within three days of the date of this Order, the Massachusetts Municipal Wholesale Electric Company shall serve a copy of this Order on the selectmen of the towns of Ludlow, Wilbraham, Hampden, Palmer and Monson, and place a copy of this Order in the libraries of those towns for public inspection; and it is

FURTHER ORDERED: That this docket shall remain open for a reasonable period of time to allow the Company to supplement its petition should it determine, for the reasons noted above, the need to obtain Department approval to survey the lands of other property owners along the primary corridor; and it is

FURTHER ORDERED: That the Petition to Intervene of the Berkshire Gas Company, filed with the Department on July 10, 1996, is hereby denied.

By Order of the Department,

John B. Howe, Chairman

Mary Clark Webster, Commissioner

Janet Gail Besser, Commissioner

APPENDIX A

LANDOWNERS TO WHOM NOTICE WAS SENT

Raymond and Theresa Fusaro
44 Forbes Hill Rd.
East Longmeadow, MA 01107

Arthur and Merle Messer
902 Glendale Road
Wilbraham, MA 01095

John and Bertha Greeley
846 Glendale Road
Wilbraham, MA 01095

Jonathan and Tina Kowinski
803 Glendale Road
Wilbraham, MA 01095

Peter and Valeria Amos
822 Glendale Road
Wilbraham, MA 01095

Dorothy L. Pepin
802 Glendale Road
Wilbraham, MA 01095

Viola C. Nordin
768 Glendale Road
Wilbraham, MA 01095

Robert and Martha Nowakowski
81 Maynard Road
Wilbraham, MA 01095

Manuel and Maria Elisa Goncalves
Don Anjos Silva
499 Windsor St.
Ludlow, MA 01056

Stephen and Denise Rourke
62 Church St.
Ludlow, MA 01056

David and Patrice Chadbourne
74 Hancock Ave.
Fort Leavenworth, Kansas 66027

Anthony and Collette Rae
106 Lyons St.
Ludlow, MA 01056

Daniel & Sandra Golec
1062 Center St.
Ludlow, MA 01056

Joseph F. Belliveau
603 Miller St.
Ludlow, MA 01056

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).